

5 March 1986
OCA 86-0100/3

MEMORANDUM FOR: Acting Director of Central Intelligence

FROM: Director, Office of Congressional Affairs

SUBJECT: Intelligence Authorization Act for Fiscal Year 1987--Summary of OMB Coordination Process & Request for Decisions on Major Issues

1. On February 26 1986 a meeting chaired by the Office of Management and Budget (OMB) was held among representatives of the various agencies that had comments on the Intelligence Authorization Bill for Fiscal Year 1987. A list of the principal agencies represented at the meeting is attached on a separate sheet (Tab A).

2. This memorandum summarizes the results of that meeting and requests from you decisions as to the major issues which remain. OMB intends to bring the coordination process to a conclusion within a week so that the Agency may transmit the approved bill to the Congress as soon as possible. The provisions not discussed below did not become issues in the OMB process, and thus will remain in the bill as initially sent to OMB.

A. Non-Controversial Items

3. In response to comments from the Archivist of the United States, Section 401 of the bill, which was originally drafted to exempt only the Agency and the National Security Agency (NSA) from the requirement to provide notice in the Federal Register of a request to destroy records, will be redrafted so as to exempt any agency that submits classified record destruction schedules.

4. The provision granting the United States interlocutory appeal authority in certain national security cases upon certification by the Director of the potential damage to national security will be redrafted so as to incorporate some minor changes suggested by the Department of Justice (DoJ).

5. For the second consecutive year, OMB (supported by the Office of Personnel Management) refused to approve inclusion in the bill of the provision to grant "unhealthful post" retirement credits to Agency employees participating in the Civil Service Retirement and Disability System. Last year, a provision providing similar benefits to Central Intelligence Agency Retirement and Disability System participants was approved by Congress. We received no support from other agencies on the proposal, perhaps because they have pushed such proposals for their civil service employees in the past, only to be similarly rebuffed by OMB. Based on last year's experience, we do not believe that an appeal of this decision to higher levels in OMB would be successful. Further, we prefer to save such appeals for the larger retirement issues, as opposed to this issue which affects at most only a handful of individuals. Accordingly, we plan no appeal of the OMB decision on this issue. The Office of Personnel concurs in this decision.

6. The Defense Intelligence Agency (DIA) has recommended that they be added to the provision in the bill that provides the Agency and NSA the authority to deal with security problems in the area of drug and alcohol abuse without regard to the provisions of any other law, rule or regulation. It is very likely that OMB will concur in this recommendation. While some have questioned the need for DIA to have this authority, we believe the DIA has made a sufficient case to justify their inclusion in the bill.

7. The National Security Council (NSC) raised objections to Title V of the bill, which authorizes Department of Defense (DoD) proprietaries. NSC objected to the provisions of Title V that defines "Foreign Intelligence", "Counterintelligence", and "Commercial Cover". They argued that definition of these terms should not be written into legislation because doing so would make it more difficult for the Administration to change these definitions at some future date. After intensive negotiations between NSC and DoD, the Department agreed to modify the definitions in exchange for NSC's agreement to withdraw their objections to the legislation.

8. At the request of the DoJ, minor drafting changes will be made to the proposal that would require that financial institutions provide to government authorities bank records for counterintelligence investigation purposes.

9. The Office of Personnel Management has raised a variety of objections to the proposal to extend certain personnel management authorities (termination authority) from DIA to military intelligence agency personnel. These objections have

not been adequately addressed by DoD, and therefore OMB will drop the provision from the bill. We plan no appeal from any OMB decision on this matter.

10. A proposal will be added to the Authorization Bill that would allow the DoD to "recycle" the proceeds obtained from certain counterintelligence investigations. This proposal was passed by Congress last year, but was only effective for one year. This year, the provision will be redrafted so as to make it permanent law when enacted.

11. The NSC has recommended that Section 1001 of the bill be deleted. That section provides that the bill does not constitute authority for the conduct of any intelligence activity not otherwise authorized by the Constitution or laws of the United States. This is a "boilerplate" provision which has been in the bill since its inception some years ago. We believe that taking it out of this year's bill as sent to the Congress would not prevent Congress from including it, but it would raise Congressional suspicions which could only be relieved by an effort on our part better put towards obtaining passage of the more substantive provisions in the bill. Therefore, we do not plan to delete this section unless OMB supports the NSC, something which we believe will not occur.

12. Finally, the NSC also sought to include in the bill all of the legislative initiatives contained in a letter from the Minority Members of the House Permanent Select Committee on Intelligence (HPSCI) to Admiral Poindexter (Tab B). Many of these legislative initiatives were included in last year's "Stump Bill". Some of these legislative proposals are contained in the Intelligence Authorization Bill but others, it was concluded, would be best addressed in the context of other legislative vehicles. In consideration of the NSC's concerns, however, we agreed to include in the letter transmitting the bill to the Congress appropriate favorable comments on the proposals.

E. Controversial Items--Request for Decisions

13. There are several legislative initiatives contained in the bill that are controversial within the Executive Branch. While we believe each of these proposals has merit, it is not likely that the disputes among the various agencies regarding these proposals will be resolved in the near future. It is our understanding that the HPSCI will mark up its version of the Authorization Bill within two weeks. Unless we transmit the Administration's approved version of the bill to Congress in the very near future, there is a substantial risk that many of the non-controversial provisions will not be considered by the HPSCI because they arrived too late. In order to ensure that

the bill is transmitted to Congress in a timely fashion, we are recommending that these controversial provisions be deleted from the bill and considered at some future date.

14. Access to Tax Return Information: The provision in the bill granting the FRI access to tax records in connection with foreign counterintelligence investigations has run into substantial opposition from the Department of Treasury (DoT). DoT objects to the entire concept of allowing the FRI access to tax return information without a court order. While negotiations are underway between FRI and DoT on this matter, it appears unlikely that they will be resolved soon. Therefore, we recommend that this provision be deleted from the bill and considered next year.

Insist that Provision
be included in Bill

Delete Provision if Treasury
and FBI cannot reach Agreement

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15. Immunity to Civil Suit: The DoJ has again objected to the provision in the bill that would provide employees of the Intelligence Community with immunity from civil suit. As it did last year, the DoJ argued that this provision would undercut efforts to obtain government-wide relief. The DoJ has been attempting to obtain relief for government workers for the last 12 years, but none of these bills has been voted out of Committee because of opposition by the American Civil Liberties Union and bar associations. It is thus unlikely that we will see any legislative solution to this problem in the foreseeable future.

16. There are a variety of administrative steps that have been taken or can be taken to reduce the severity of this problem. First, the Agency has established its own indemnification plan to protect its employees. The plan provides for the indemnification of an employee for any judgment or fine entered against the employee if the General Counsel determines that the employee has been acting in good faith and within the scope of employment. The DoJ has a similar plan that indemnifies employees on a case-by-case basis, and has recently taken steps to formalize the indemnification program and apply it government-wide. Second, the Office of General Counsel has suggested that the Agency consider obtaining a liability insurance policy that would cover key employees who are likely to be sued in their personal capacity. The difference between the insurance program and the

already existing indemnification program is that under the insurance program the employee would have higher confidence of being indemnified.

17. Given the administrative remedies available to deal with the problem of Agency employees being held liable, the need for legislative relief in this area is not as critical as it was several years ago. Furthermore, it is unlikely that Congress would enact legislative relief for Intelligence Community personnel. Therefore, we recommend that a legislative solution to the problem of civil liability for Intelligence Community employees not be pursued at this time. Instead, we recommend that the Director send a letter to the Attorney General urging the DoJ to quickly implement the government-wide indemnification plan. We will prepare such a letter and provide it to you in the near future.

Include Personal
Tort Liability
Provision in Bill

Delete this Provision, but
send letter to Justice
requesting Implementation
of Government-wide indemni-
fication plan

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18. Restrictions on Employment by Former Intelligence Officers: Title VIII of the bill is a broad proposal to restrict the employment of former officers and employees of the Intelligence Community by foreign powers. The problems of disclosure of classified information and the appearance of a conflict of interest posed by former intelligence officers working for a foreign government are very serious issues which we believe must be dealt with. However, in the OMB review process, this particular proposal received very negative comments from almost every agency concerned, including the NSC, the Department of State (DoS), the DoJ, and within the Agency, the Directorate of Operations. The comments are summarized as follows.



19. The proposal was viewed as unnecessary and overbroad, reaching innocent as well as improper activities. Many voiced the sentiment that the Wilson-Terpil case, the principal justification for such legislation, was an isolated incident and not sufficient to justify the proposal to Congress. Furthermore, it was pointed out that the Wilson case proves that the government already has a powerful array of laws to deal with former intelligence officers who provide military

goods and services to foreign countries. There were also objections to the inclusion within the proposal of all employees of the DoS since not all employees are involved in intelligence-related matters.

20. The bill's reporting requirements were viewed as quite burdensome, especially when added to the burdens already imposed on federal employees by the provisions of the various "ethics" laws. The ability of certain agencies or categories of employees within agencies to opt out of the proposal through administrative action by the agency head was seen by the NSC as unfairly singling out officers and employees of the Directorate of Operations, something contrary to the Administration's goals of making such service attractive. To the extent that the bill prohibited even association by former officers and employees with foreign powers, the DOJ viewed it as constitutionally infirm. The Department noted that legislation it previously proposed, which would restrict similar activities by United States persons vis a vis "designated" terrorist organizations, had been defeated for just this reason.

21. In the face of this almost uniform negative reception, OMB decided at the working-level to drop the provision restricting employment by former intelligence officers from the bill. We believe there is virtually no possibility of its reinclusion in the bill, absent a successful high-level appeal to OMB. We do not recommend such an appeal because we doubt it will be successful. Instead, we recommend that in the letter we are preparing to the Attorney General on the "torts immunity" provision, you mention the problem of former intelligence officers working for foreign governments and suggest that the DoJ and the Agency continue to work on possible solutions. One solution would be a scaled-down version of the provision to be introduced as separate legislation. In this regard, it should be noted that the item remains in the Director's legislative program for this year.

Include Post-Employ-
ment Restriction
Provision in
Bill

Delete Provision, but
work with DoJ to narrow
scope of proposal so that
it may be introduced as
separate legislation

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22 "Leaks" Legislation: Last year, you will recall, leaks legislation was included in the Intelligence Authorization Bill as sent to OMB. It was deleted by OMB, principally at the insistence of the DoJ. DoJ did agree, though, to revisit the issue of leaks and to work on legislation which the entire Administration could support.

23. This year, DoJ again objected to inclusion of leaks legislation in the Authorization bill. When confronted with its commitment of last year, DoJ responded that with the successful use of the espionage laws to prosecute Samuel Elliot Morison for "leaking" overhead reconnaissance photography to Jane's Fighting Ships, the situation had changed.

24. DoJ asserted that if Morison holds up on appeal (currently it is on appeal to the Fourth Circuit Court of Appeals and will likely go, in any event, to the Supreme Court), there will be no need for leaks legislation as the espionage statutes will now be available for use against leakers. DoJ is also of the opinion that the use the Department can make of the espionage statutes, as interpreted by the Morison court, to combat leakers will be broader than any leaks legislation which could be obtained from the Congress. In addition, DoJ has several technical concerns about the bill: essentially it would like to see deleted the various defenses which were included in the bill in order to make it more palatable to the Congress. Finally, DoJ and other agencies do not believe that an item of the magnitude of leaks legislation should be put on the Intelligence Authorization Bill.

25. Because of the above stated concerns, OMB determined at the working level to delete leaks legislation from the bill. This decision could only be undone by a an appeal to OMB by senior Agency officials.

26. We recommend that the OMB decision be allowed to stand, but that you take specific steps in the immediate future to obtain a decision from the Administration as to whether or not leaks legislation is to be pursued and, if so, to obtain agreement on the version to receive Administration support. These steps include the transmission of a letter to the Attorney General, with copies to all appropriate senior Administration officials, raising the issue and pressing for a meeting of the National Security Planning Group (NSPG) on the issue. We are preparing such a letter and will provide it to you shortly. NSC staff has informally agreed to support such a meeting. Leaks legislation, in any event, remains in the Legislative Program and could be pursued as separate legislation.

Appeal to OMP and
White House to re-
tain Leaks provision
in Bill

Delete Leaks Provision, but
send letter to Attorney
General and press for NSPG
meeting to discuss Leaks
Legislation

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David D Gries

Attachments:
as stated

TAB A

Principal Agencies Present
at OMB Meeting on
FY 1987 Intelligence Authorization Bill

Department of State

Department of Justice: Chief, Office of Criminal Law;
Office of Intelligence Policy; Office of Legislative Affairs;

National Security Council: Director, Intelligence Programs

Department of the Treasury: General Counsel's Office;
Internal Revenue Service;

Department of Defense: Department of the Army; Defense
Intelligence Agency

Federal Bureau of Investigation

National Security Agency

Office of Personnel Management

Equal Employment Opportunity Commission

Merit Systems Protection Board

General Services Administration: Information Security
Oversight Office

U.S. HOUSE OF REPRESENTATIVES

PERMANENT SELECT COMMITTEE

ON INTELLIGENCE

WASHINGTON, DC 20515

GEORGE E. BROWN JR., CALIFORNIA
MATTHEW F. MEHNER, NEW YORK
BERNARD J. Dwyer, NEW JERSEY

BOB STUMP, ARIZONA
ANDY IRELAND, FLORIDA
HENRY J. HYDE, ILLINOIS
DICK CHENEY, WYOMING
BOB LIVINGSTON, LOUISIANA
BOB MCEWEN, OHIO

THOMAS K. LATIMER, STAFF DIRECTOR
MICHAEL J. O'NEIL, CHIEF COUNSEL
STEVEN K. BERRY, ASSOCIATE COUNSEL

December 10, 1985

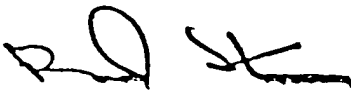
Vice Admiral John M. Poindexter, USN
Assistant to the President
for National Security Affairs
The White House
Washington, D.C. 20500

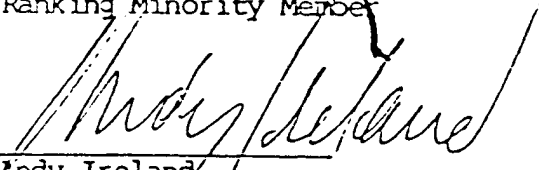
Dear Admiral Poindexter:

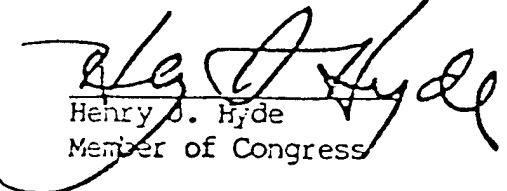
As you know, the Administration will soon forward to the Congress its proposed Intelligence Authorization Act for Fiscal Year 1987. We would urge that the National Security Council take an especially active role in the formulation of the Administration's proposed bill. We believe an active NSC role would be more likely to produce a bill which advances the President's program than would be a bill produced by the mid-level interagency coordination process.

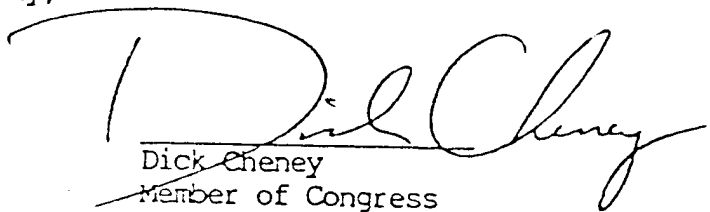
Enclosed for your consideration in the context of the Administration's formulation of the FY 1987 Intelligence Authorization Act is the intelligence-related legislative agenda which we support as Republican Members of the Permanent Select Committee on Intelligence. The enclosed legislative proposals represent provisions introduced earlier this year by one or more Republican Members and legislative initiatives we think deserving of Administration support. We especially commend to your attention the proposals to improve FBI counterintelligence access to bank and tax records and the proposal to improve cryptographic security of U.S. communications.

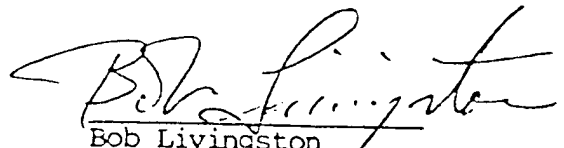
Sincerely,

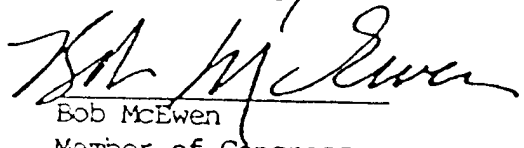

Bob Stump
Ranking Minority Member


Andy Ireland
Member of Congress


Henry J. Hyde
Member of Congress


Dick Cheney
Member of Congress


Bob Livingston
Member of Congress


Bob McEwen
Member of Congress

RECOMMENDED PRESIDENT'S PROGRAM PROPOSALS
(Priority items meriting direct presidential support)

FBI Counterintelligence Access to Bank and Tax Records (Tab A)--Amends Right to Financial Privacy Act and Internal Revenue Code to grant the Federal Bureau of Investigation access to financial and tax records in foreign counterintelligence investigations.

Cryptographic Security of U.S. Government Agencies and Contractors (Tab B)--
Authorizes the Secretary of Defense to issue regulations on the purchase, use and disposal of cryptographic equipment by the U.S. Government and government contractors.

RECOMMENDED INTELLIGENCE COMMUNITY PROGRAM PROPOSALS

Permanent Authority for DOD Counterintelligence Polygraph Program (Tab C)--
Establishes in permanent law the DOD counterintelligence polygraph program which Congress has authorized in the past on a year-to-year basis.

Counterintelligence Restrictions on Foreign Diplomatic Personnel (Tab D)--
Requires determinations by the Director, FBI that travel by foreign diplomats within the United States is not inconsistent with U.S. national security interests before the Secretary of State may authorize such travel.

Congressional Security Survey (H.R. 3387) (Tab E)--Provides for an FBI survey, under the guidance of the congressional leadership, of congressional personnel, physical, document and communications security arrangements relating to classified information.

Pretrial Notice Requirement for Intelligence/Law Enforcement Defense (Tab F)--
Requires pretrial notice by criminal defendants that they will claim to have been working secretly for a U.S. intelligence or law enforcement agency at the time of the alleged offenses.

Federal Employee Pension Forfeiture for Conviction for Disclosing Identities of Covert U.S. Intelligence Agents (H.R. 3388) (Tab G)--Amends existing federal statute disqualifying employees from pensions for conviction of national security offenses to include among those offenses the federal felony of disclosing the identities of U.S. covert intelligence agents.

Civilian Espionage and Treason Death Penalty Procedures (Tab H)--Establishes constitutional procedures for imposition of the existing death penalty for espionage and treason.

Criminal Penalties for Unauthorized Disclosure of Classified Information by Federal Employees (Tab I)--Establishes criminal penalties for unauthorized disclosures of classified information by federal employees.

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NOTE: Items at tabs contain legislative provisions and brief summaries of need for legislation.